

ITA No.145 of 2010

IN THE HIGH COURT AT CALCUTTA  
Special Jurisdiction (Income Tax)  
ORIGINAL SIDE

JIAUDDIN MOLLAH

-Versus-

CIT. KOL-XVI

BEFORE:

The Hon'ble JUSTICE GIRISH CHANDRA GUPTA

The Hon'ble JUSTICE ASHA ARORA

Date : 13<sup>th</sup> June, 2016.

Appearance:

Mr. Malay Dhar, Adv.  
...for the appellant.

Mr. Aniket Mitra, Adv.  
...for the respondent.

The Court : The appeal is directed against a judgment and order dated 15<sup>th</sup> January, 2010 passed by the learned Income Tax Appellate Tribunal, Bench-A, Calcutta pertaining to the assessment year 2006-07 allowing an appeal of the revenue. The aggrieved assessee has come up in appeal. The question formulated at the time of admission of the appeal reads as follows:

"Whether the learned Tribunal on the facts and in the circumstances of the case was justified in law in reversing the decision of the Commissioner of Income-Tax (Appeal) and upholding the addition of Rs.16,50,390/- made by the Assessing Officer by

invoking Section 194C(2) read with Section 40(a)(ia) of the Income Tax Act ?"

Mr. Dhar, learned Advocate appearing for the assessee submitted that the question has to be reformulated because the real controversy is "whether the view taken by the learned Tribunal that the four persons who received payments aggregating to Rs.16,50,390/-, acted as sub-contractor of the assessee is perverse ?"

Mr. Mitra, learned Advocate for the respondent has not disputed that the correctness of the aforesaid finding is the subject-matter of the appeal. In that view of the matter, the question is reformulated as above.

Section 40(a)(ia) of the Income Tax Act, was applied for the purpose of disallowing an expenditure of a sum of Rs.16,50,390/- paid by the assessee to the aforesaid four persons on the ground that the assessee did not deduct tax at source under Section 194C(2) which, at the relevant point of time, provided as follows:

*"(2) Any person (being a contractor and not being an individual or a Hindu undivided family) responsible for paying any sum to any resident (hereafter in this section referred to as the sub-contractor) in pursuance of a contract with the sub-contractor for carrying out, or for the supply of labour for carrying out, the whole or any part of the work undertaken by the contractor or for supplying whether wholly or partly any labour which the contractor has undertaken to supply shall, at the time of credit of such sum to the account of the sub-contractor or at the time*

of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to one per cent of such sum as income-tax on income comprised therein:

[**Provided** that an individual or a Hindu undivided family, whose total sales, gross receipts or turnover from the business or profession carried on by him exceed the monetary limits specified under clause (a) or clause (1)) of section 44AB during the financial year immediately preceding the financial year in which such sum is credited or paid to the account of the sub-contractor, shall be liable to deduct income-tax under this sub-section]

[Explanation I.-For the purposes of sub-section (2), the expression "contractor" shall also include a contractor who is carrying out any work (including supply of labour for carrying out any work) in pursuance of a contract between the contractor and the Government of a foreign State or a foreign enterprise or any association or body established outside India]

[Explanation II].-For the purposes of this section, where any sum referred to in sub-section (1) or sub-section (2) is credited to any account, whether called "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.]

[Explanation III.-For the purposes of this section, the expression "work" shall also include-

- (a) advertising;
- (b) broadcasting and telecasting including production of programmes for such broadcasting or telecasting;
- (c) carriage of goods and passengers by any mode of transport other than by railways;
- (d) catering]"

Mr. Dhar contended with some justification that before his client can be roped in under Section 194C(2), the revenue has to

establish that the assessee has entered into a contract with the aforesaid four persons for carrying out the whole or part of the work undertaken by the assessee. He submitted that there is nothing on the record to show that the assessee has assigned the work undertaken by him to the aforesaid four persons or to anyone of them. He added that there has to be an offer and acceptance before a contract can come into existence. In the case before us, there is nothing to show that there was any such offer and acceptance between the assessee and the aforesaid four persons. On the contrary, the evidence which is on record, namely, letters received by the assessing officer from the aforesaid four persons, in sum and substance convey as follows:

- a. Nizamuddin Sardar wrote to the assessing officer stating that he received a sum of Rs.2,75,480/- on account of wages. He added that part of the aforesaid sum was paid by him on account of wages to the mazdoors employed by him.
- b. Mabuda Faujdar wrote to the income tax officer stating a sum of Rs.5,34,440/- was payable to him on account of wages out of which a sum of Rs.4,83,175/- was paid and the balance sum of Rs.45,265/- was payable by the assessee. He added that he also had engaged mazdoors and part of the amount received by him was paid to them.

- c. Gafur Sardar wrote to the income tax officer stating that he collected a sum of Rs.4,80,540/- from the assessee for payment to the mazdoors engaged by him.
- d. Samir Parui wrote to the income tax officer stating that he along with other labourers worked for the assessee and received a sum of Rs.4,10,680/-.

The letters go to suggest that the aforesaid four persons were the agents of the assessee. They got the work done on behalf of the assessee. There is nothing before us to show that there was any assignment by the assessee of the work which was entrusted to him by his employers. Those four persons were expressly or impliedly authorised by the assessee to name other persons to act on behalf of the assessee which is also contemplated under Section 194 of the Contract Act which provides as follows:

**"194. Relation between principal and person duly appointed by agent to act in business of agency.-** Where an agent, holding an express or implied authority to name another person to act for the principal in the business of the agency, has named another person accordingly, such persons is not a sub-agent, but an agent of the principal for such part of the business of the agency as is entrusted to him.

*Illustrations*

(a) A directs B, his solicitor, to sell his estate by auction, and to employ an auctioneer for the purpose. B names C, an auctioneer, to conduct the sale. C is not a sub-agent, but is A's agent for the conduct of the sale.

(b) A authorises B, a merchant in Calcutta, to recover the moneys due to A from C & Co. B instructs D, a solicitor, to take

*legal proceedings against C & Co., for the recovery of the money. D is not a sub-agent, but is solicitor for A."*

The persons engaged by the aforesaid four persons were not sub-agents but they were working for the principal namely, the assessee in this case. The payment made to those persons through the hands of the aforesaid four persons is a payment made directly by the assessee to those persons because well settled principles of law is that when one acts through another, he acts himself.

C.I.T (Appeal) in his order opined as follows:

*"There is no evidence on record to prove that these persons are sub-contractors. In the absence of such evidence, the appellant's contention that the payments are made to these persons who are actual workers has merit. The provisions of sec.194C(1) are not applicable for the labour charges paid by the appellant. Since tax is not deductible, there is no contravention of sec.194C. The A.O. is not correct in disallowing the labour charges under section 40a(ia). In view of the decision of the ITAT relied upon by the appellant, the labour charges are allowable. The A.O. is directed to delete the addition of labour charges of Rs.16,50,390/-."*

It was the bounden duty of the learned Tribunal before interfering with the order of the CIT (Appeal) to demonstrate that the order passed by the CIT(Appeal) is wrong. It is well-settled "A court of appeal interferes not when the judgment under attack is not right but only when it is shown to be wrong." If any authority is needed, reference may be made to the judgment in the case of *Padma Uppal vs The State of Panjab* reported in AIR 1977 SC

580. Mr. Mitra appearing for the revenue was unable to show any reasoning advanced by the learned Tribunal to demonstrate that the aforesaid finding of the learned CIT was wrong. Except for the four letters which we already have quoted above, there was no other evidence available. On the basis of the aforesaid four letters it was not possible to hold that the aforesaid four persons were sub-contractors nor was it possible to hold that the assessee had assigned the work entrusted with him to those four contractors. Unless these two facts were proved, the question of Section 194C(2) becoming applicable to the assessee could not arise.

For the aforesaid reason, we are convinced that the order passed by the learned Tribunal is perverse. Therefore, the question is answered in the affirmative and against the revenue. The appeal is, thus, allowed. Parties shall, however, bear their own costs.

(GIRISH CHANDRA GUPTA, J.)

(ASHA ARORA, J.)